(11)

No. 89-680

In The

Supreme Court of the United States

October Term, 1990

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE I. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Certiorari To The Supreme Court Of Georgia

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ARGUMENT

I. BEAM IS ENTITLED TO RETROACTIVE RELIEF UNDER THE REASONING OF EITHER THE PLURALITY OR DISSENT IN *AMERICAN TRUCKING ASSOCIATIONS, INC. V. SMITH*

In *American Trucking Associations, Inc. v. Smith*, 58 U.S.L.W 4704 (U.S. June 4, 1990) (No. 88-325) ("*ATA*"), this Court was divided on the issue, whether constitutional decisions of the Court can ever apply only prospectively in pending civil cases. The plurality opinion, authored by Justice O'Connor, applied the criteria set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) ("*Chevron Oil*"), for determining when a constitutional decision would not follow the general rule of retroactive application. Justice Scalia, concurring only in the Court's judgment in *ATA*, stated his opinion, "Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." *ATA, supra*, 58 U.S.L.W. at 4714. Joining Justice Scalia's opinion that constitutional substantive law must receive retroactive and prospective application, Justice Stevens authored the dissent in *ATA*, in which three other Justices joined. The dissent expressed the opinion that "Petitioners are entitled to an adjudication of the constitutionality of the Arkansas tax under our best *current* understanding of federal law regardless of the good faith of the Arkansas legislators." *Id.*, 58 U.S.L.W. at 4715 (emphasis in original). Thus, five of the nine Justices in *ATA* expressed the view that substantive constitutional law by its nature must always

apply retroactively. Regardless of which of these opinions embodies the ultimate view of the Court on the issue of retroactivity in general, Beam is entitled to retroactive *relief* in the instant case.

A. Beam is Entitled to Retroactive Relief Under the Analysis of the Plurality in *ATA*

As is discussed more fully below and in Argument II of Beam's original brief at pages 19-42, Beam is entitled to retroactive relief under the analysis of the *ATA* plurality and the criteria of *Chevron Oil*.

1. Bacchus did not overrule prior precedent or establish any new rule that had not been clearly foreshadowed.

This Court's last pertinent application of the *Chevron Oil* criteria occurred in *Ashland Oil, Inc. v. Caryl*, 58 U.S.L.W. 3832 (U.S. June 28, 1990) (No. 88-421) ("*Ashland Oil*"). In *Ashland Oil*, the Court relied upon the opinions of both the plurality and the dissent in *ATA* in reaching the result of retroactive application of the decision at issue, namely *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). Thus, the Court issued a *per curiam* opinion in *Ashland Oil*. In addressing the State's argument under *Chevron Oil* that *Armco* was so revolutionary that it should be accorded prospective application only, this Court stated:

> In *Armco*, . . . the Court relied on *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 322, n. 12 (1977), which held that a State "may not discriminate between transactions on the basis of some interstate element." On its face, West Virginia's statutory scheme had just such a discriminatory effect, as it "provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it."
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> * * *
>
> *Armco* unquestionably contributed to the development of our dormant Commerce Clause jurisprudence. . . . In adopting the internal consistency test, *Armco* extended that doctrine beyond the context in which it had originated. *See* 467 U.S., at 648 (REHNQUIST, J., dissenting). Nevertheless, *Armco* neither overturned established precedent nor decided "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil, supra*, at 106. To be sure, *Armco* paved the way for *Tyler Pipe Industries, Inc. v. Washington State Dep. of Revenue*, 483 U.S. 232 (1987), which arguably "overturn[ed] a lengthy list of settled decisions" and "revolutioniz[ed] the law of state taxation," *id.*, at 257 (SCALIA, J., concurring in part and dissenting in part), by extending the internal consistency test. *Armco* itself, however, was not revolutionary.

Ashland Oil, supra, 58 U.S.L.W. at 3832 (footnotes and citations omitted in part).

As is recognized by the State of California in its *amicus* brief filed in the instant matter, the test for determining when the first prong of the *Chevron Oil* test has been met is very narrow. *Amicus* Brief of California, et al., at 5.[1] This is so because the presumption with respect to

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[1] The State of California stated:

> Amicus California respectfully urges the Court to exercise restraint in interpreting the first prong of

(Continued on following page)

decisions of this Court is in favor of retroactive application. Brief of the Petitioner at p. 20. At most, *Chevron Oil* established a set of three criteria for the aberrational case where that presumption would not apply.[2]

Even a cursory review of this Court's modern day opinions makes clear that the State's purported reliance upon the cases of the 1930's is misplaced. *Craig v. Boren*, 429 U.S. 190 (1976), left no doubt that the broad statements in dicta in *Mahoney v. Joseph Triner Corporation*, 304 U.S. 401 (1938), that the Equal Protection Clause of the Fourteenth Amendment did not apply in the context of Twenty-first Amendment regulation were not the law. Similarly, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*Midcal*") left no reasonable doubt that similar broad statements in *State Board of Equalization v. Young's Market*, 299 U.S. 59 (1936),

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(Continued from previous page)

> the *Chevron* test in what appears to be an increasingly narrower manner leading to few or no situations where a decision would apply prospectively only. The direction of this Court suggests that ultimately, perhaps the only situation in which that prong would be satisfied is where one United States Supreme Court decision is expressly overruled in a majority opinion of a later United States Supreme Court decision.

Amicus Brief of California, et al., at 5.

[2] As is demonstrated in *ATA* and *Ashland Oil*, whether *Chevron Oil* even applies to determine retroactivity of federal constitutional law in pending civil cases remains unsettled. Based upon the concurring and dissenting opinions of five Justices, it would appear that *Chevron Oil* does not apply.

on which the State relies heavily, renouncing the Commerce Clause in the context of Twenty-first Amendment regulation were likewise not the law.

Craig v. Boren left a flicker of life in the assertion outlined in the dictum analysis in *Young's Market* that the states were unfettered by the Commerce Clause when acting under the aegis of the Twenty-first Amendment. In distinguishing *Mahoney* and *Young's Market*, the Court in *Craig v. Boren* noted that:

> [T]he arguments in both cases centered upon importation of intoxicants, a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear, *Hostetter v. Idlewild Bon Voyage Liquor Corp., supra*, 377 U.S. at 330, and n.9, and touched upon purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment . . . . Cases involving individual rights protected by the Due Process Clause have been treated in sharp contrast.

Id., 429 U.S. at 462. The State suggests in its brief that this language distinguishes *Craig v. Boren* from the instant case, and insulates Georgia's protectionist scheme from pre-*Bacchus* scrutiny.

However, *Midcal* made clear in 1980 that while the *Young's Market* analysis may yet hold with respect to state laws governing *"whether to permit importation or sale of liquor* and *how to structure the liquor distribution system,"* laws outside the confines of those two categories are

"subject to the federal commerce power in appropriate situations." *Midcal*, 455 U.S. at 110 (emphasis supplied).[3]

The clear mandate of *Midcal* is that where the State's regulation impacting interstate commerce has nothing to do with determining whether it will allow the importation or sale of alcohol or how it will structure the distribution system, a balancing of competing federal and state interests must follow. Georgia's pre-*Bacchus* statute clearly does not fall into either of these two categories. Thus, the State's interests must be balanced against the federal interests under the mandate of *Midcal*. Since the State's purpose behind the legislation was pure economic protectionism and the effect of the statute was to bolster local business interests to the detriment of out-of-state business interests, making the legislation practically *per se* invalid under the Commerce Clause, Joint Appendix ("J.A.") at 101, the State had no reason to believe that its interests would survive such a balancing.

As the unanimous Court held in *Ashland Oil*, the notion that a State may not discriminate between intrastate and interstate commerce through taxation is not new. As in *Armco*, the *Bacchus* Court relied on the cardinal rule that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Bacchus Imports, Ltd. v. Diaz*, 468 U.S. 263, 268 (1984) ("*Bacchus*") (quoting *Boston*

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[3] *Midcal's* pronouncement on this issue was nothing new. The Court squarely rejected the notion that the Twenty-first Amendment repealed the Commerce Clause in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964).

Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977) and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)). The *Bacchus* Court accordingly had no difficulty in reaching its holding: "It is therefore *apparent* that the Hawaii Supreme Court erred in concluding that there was no improper discrimination against interstate commerce. . . . " *Bacchus, supra*, 468 U.S. at 272 (emphasis supplied).[4]

Despite clear and firmly established law prohibiting discrimination through taxation, and despite the clear language of *Midcal* requiring a balancing of the state and federal interests implicated by the pre-*Bacchus* statute, the State argues that it was entitled to ignore completely all decisions of this Court under the Commerce Clause unless those decisions also involved intoxicating beverages. In other words, the State closes its eyes to the precedent of this Court set forth in *Midcal*, and advances its own unwarranted extension of cases that predated *Midcal*. The State's decision to ignore federal interests under the Commerce Clause despite the clear mandate of *Midcal* and long-standing principles opposing discriminatory taxation is little more than a poor attempt to create a subterfuge. In doing so, the State now wishes to avoid any adverse ramifications to itself by claiming that it was entitled to place blinders over its eyes with respect to law

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[4] This is in sharp contrast to the *Scheiner* decision at issue in *ATA*, because in *Scheiner*, both the majority and the dissent recognized that the majority's opinion constituted a substantial departure from prior law. *American Trucking Ass'n v. Scheiner*, 107 S.Ct. 2829, 2847 and 2848 (O'Connor, J., dissenting).

under the Commerce Clause while charging Beam $2.5 million pursuant to an illegal statute. Such a result should not be countenanced.[5]

The State's attempt to apply the *Chevron Oil* criteria to this case so as to yield non-retroactive application shaves hairs too finely, so much so, in fact, that if the State's analysis were correct, almost all decisional authority would establish "a new principle of law" under *Chevron Oil*, and thus the presumption of retroactivity would be turned on its head. In its brief, the State asserts, "[A]t no time before the 1984 decision in *Bacchus* did the Court find that the Commerce Clause alone limits a state's right to regulate the importation of alcoholic beverages into its borders." Brief for Respondents at pp. 15-16. In attempting to establish this distinction of *Bacchus* from prior case law, the State completely ignores the delineation set forth by this Court in *Midcal* as discussed above. Acknowledging three categories of Supreme Court authority that limit the states' power to regulate under the Twenty-first Amendment, the State uses this narrow distinction between *Bacchus* and those authorities in an attempt to

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[5] At the most, *Bacchus* was an extension of *Midcal*. *Midcal* had already held that with regulation such as that at issue here, the State's interests under the Twenty-first Amendment must be weighed against the federal interests under the Commerce Clause. The Commerce Clause interests were clear. The fact that *Bacchus* extended the rationale of the cases upon which it relied does not bring *Bacchus* within the ambit of new law as described in *Chevron Oil*. *See Ashland Oil*, as quoted *supra* at pp. 2-3.

sustain its proposition that *Bacchus* established a "new principle of law."

The linchpin of the State's argument is found at page 16 of its Brief in the following statement:

> The cases in which the Court recognized limitations [on a state's exercise of its Twenty-first Amendment powers] basically fall within three groups: (1) those cases in which the state attempted to regulate alcoholic beverages travelling *through* the state but not *into* the state for use therein; (2) those cases in which the state's regulatory authority conflicted with federal regulatory laws enacted under the Commerce Clause; and (3) those cases in which the state's regulatory authority conflicted with a provision of the Constitution other than the dormant Commerce Clause.

Resp. Brf. at p. 16 (footnote omitted.) The State argues that because *Bacchus* does not come within any of those three categories it established "a new principle of law" and, thus, under *Chevron Oil*, should not be given retroactive application. The fatal flaw with the State's analysis is that the categories are too narrowly drawn to give *Chevron Oil* and the presumption of retroactivity any real meaning.

Chevron Oil does not prescribe non-retroactivity in cases "whose resolution had not already been decided on their precise facts" but rather "whose resolution was not clearly foreshadowed". *Chevron Oil*, 404 U.S. at 106. If the former situation were subsumed under the *Chevron Oil* criteria, almost no decision would be applied retroactively, which is obviously not the case. In short, the

distinctions between *Bacchus* and the decisions that presaged it are so narrow that a ruling that it was not clearly foreshadowed by those decisions would improperly limit *Chevron Oil* to only those cases expressly overruling prior decisions, which is clearly not what *Chevron Oil* would prescribe.

For example, the State's argument hinges upon the wholly unsubstantiated proposition inherent in category (2), above, that federal interests pursuant to a statute promulgated under the authority of the Commerce Clause exceed the federal interests in promoting competition inherent in the Constitution itself. The State argues that the federal interest is greater when pursued through a statute enacted pursuant to the Commerce Clause than in the so-called negative Commerce Clause area, where Congress has not expressly exercised the federal authority over interstate commerce in the form of positive legislation. See generally the State's discussion of *Midcal* at pages 17 and 18 of its brief. *Midcal* voided California's price maintenance system, which conflicted with the Sherman Act, passed by Congress pursuant to the Commerce Clause authority. The State would distinguish *Midcal* on the basis of the absence in the instant case of any conflicting federal legislation. However, there is simply no support for this proposition in the case law. The "dormant" Commerce Clause cases clearly establish a federal procompetition interest implicit in the Commerce Clause itself that is coextensive with Congress's authority under that Clause.

In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court expressly rejected the very two-tiered distinction

the Respondents seek to make between *Midcal* and *Bacchus, i.e.*, that the sweep of the Commerce Clause is much more limited where Congress has not animated its potential through legislation. "We think the [state] court misread our cases, and thus erred in assuming that they require a two-tiered definition of commerce." *Id.*, 437 U.S. at 622. "In the absence of federal legislation, these subjects [of local character] are open to control by the states *so long as they act within the restraints imposed by the Commerce Clause itself.*" *Id.* at 623 (citing *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978) (emphasis supplied)). Similarly, "the Commerce Clause has been interpreted by the Court not only as an authorization for congressional action, but also, even in the absence of a *conflicting federal statute*, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1978) (emphasis supplied). *See also Tyler Pipe Industries v. Washington State Dept. of Revenue*, 107 S.Ct. 2810 (1987) (facially discriminatory scheme excepting manufacturers selling locally from wholesale tax with no corresponding exception for wholesale taxes paid to other states violates the dormant Commerce Clause); *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984) (wholesale gross receipts tax from which local manufacturers are exempt violates the dormant Commerce Clause – "It has long been established that the Commerce Clause *of its own force* protects free trade among the states. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). . . . " (emphasis supplied)); *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450, 458 (1958) ("It has been a long established doctrine that the Commerce Clause gives exclusive power to the Congress

to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restriction or imposition by the States," *citing Gibbons v. Ogden*, 9 Wheat. 1 (1824)).

Midcal refined the analysis in this area so as to validate the intrusion of state authority into the void for certain narrow, limited purposes under the Twenty-first Amendment, but the instant case falls squarely outside those narrow purposes. The statute in this case in no way seeks to prohibit the importation of alcohol into the State of Georgia or to craft a distribution system. Rather, it simply seeks to impede importation so as to protect and ensure the economic well-being of those who are engaged in the local production of alcoholic beverages.

Surely, when *Craig v. Boren* and *Midcal* outlined the narrow realms within which the states are immune from Commerce Clause strictures, it became obvious that the federal interest in interstate competition is paramount in areas in which the states' only interest is *per se* invalid local protectionism. The Georgia courts themselves have found the pre-*Bacchus* statute at issue in this case to embody discriminatory purpose and effect. *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989). *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37 (1980); and *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Midcal, in and of itself, disposes of the State's erroneous argument that "[i]n *Bacchus*, the Court recognized for the first time the existence of 'central purposes'

underlying the Twenty-first Amendment, which purposes did not include permitting 'states to favor local liquor industries by erecting barriers to competition.' " Resp. Brf. at p. 7. In *Midcal*, the California state court "found little correlation between resale price maintenance and temperence." 445 U.S. at 112. This Court endorsed the state court's conclusion drawn from this finding that "the asserted state interests are less substantial than the national policy in favor of competition." *Id.* at 113. The Georgia courts here have concluded that the purpose behind the statute in issue was nothing more than local protectionism. The implications of *Midcal* for this case are clear and certain. The State's attempt to distinguish *Midcal* is hopelessly flawed.

2. The State's argument that retroactive application would not further the purposes of the Commerce Clause is circular.

The State argues in its Brief, beginning at page 21, that because the pre-*Bacchus* statute at issue here was a "legitimate state taxation of interstate commerce" prior to the *Bacchus* decision, the purposes animating the Commerce Clause would not be furthered by retroactive application of *Bacchus*. This argument presupposes that Georgia's blatantly protectionist measure in fact constituted "legitimate state taxation of interstate commerce," which of course entirely begs the very question on appeal in this case. The State's argument amounts to a tacit acknowledgement that if the State does not prevail in its argument that *Bacchus* established a new principle of law, this Court need proceed no further in analyzing the *Chevron Oil* criteria. The State seeks to bolster its circular

argument with the proposition that retroactive application will not deter further abuses by Georgia since the State has already amended the offending statute. Resp. Brf. at p. 22. That argument rings particularly hollow in the wake of admissions by the State's own agents that the purpose and effect of the new statute do not vary from that of the old – pure local protectionism.[6] Even less impressive than the State's protest that it has amended the offending statute is its assertion at page 23 of its brief that if *Bacchus* is applied retroactively Beam would pay no portion of its share of the tax burden. It is true that Beam sought a refund of *all* of the taxes it paid pursuant to the offending statute. However, that is simply the relief that the State provided under its refund statute, which the Supreme Court of Georgia declined to enforce. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 58 U.S.L.W. 4665 (U.S. June 24, 1990) (No. 88-192), thoroughly discussed below and by Beam in its initial brief, provides ample opportunity for the State to fashion a refund remedy that will ensure that Beam shoulders its fair share of the tax burden.

3. The record does not support the assertion that retroactive application of *Bacchus* would produce substantial inequitable results.

Beginning at pages 25-26 of its Brief, the State argues under the opinion of the *ATA* plurality that retroactive

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[6] As stated by the State's Senior Assistant Attorney General in reference to the post-*Bacchus* statute, "[T]he real desire even in the new legislation is to favor local alcohol industries. . . . " S.R. at p. 27.

application of *Bacchus* would create substantial economic hardship for Georgia. First, *McKesson* makes clear that the State can fashion a remedy requiring it to refund *no money*. In fact, pursuant to *McKesson* the State is well within its rights to *increase* its revenues by collecting retroactively taxes not paid by the beneficiaries of the discriminatory taxing scheme. In short, even if it were true, as the State suggests, that "the State is literally struggling to find revenues to pay for billions of dollars in infrastructure needs," there is simply no reason to believe that the State's compliance with *McKesson* will significantly disrupt the State's efforts in that respect.

Moreover, the record in no way supports the State's suggestion that it would experience such a struggle. The only evidence upon which the State relies is that other refund actions are pending. Resp. Brf. at 25. The State has not submitted any evidence to this Court or to any other to show what percentage of its budget is potentially implicated by the instant suit, or of any particular fiscal problem that the State is experiencing. The State has not sought to analyze the methods available to it to raise additional revenues. In short, the State cannot assert on this record that it would suffer any particular hardship by virtue of retroactive relief in favor of Beam.

B. Under Justice Scalia's Opinion in *ATA*, Beam is Entitled to Retroactive Relief

Under Justice Scalia's concurring opinion in *ATA*, the Court should address the constitutionality of the statute by applying the Court's current understanding of federal

law. The State has practically admitted for purposes of this appeal that the statute is unconstitutional under *Bacchus*. Moreover, as shown in Beam's discussion in Argument II of its original brief and the discussion below, application of the Court's understanding that the Georgia statute at issue is and was at all pertinent times unconstitutional would not upset the State's settled expectation based upon principles of *stare decisis*.

C. Under the Reasoning of the Dissent in *ATA*, Beam is Entitled to Retroactive Relief

Under the opinion of the dissent in *ATA*, the Court should go straight to the due process issues addressed in *McKesson*, as Beam has done in its original brief. Pet. Brf., Argument I at 15-19. This is so because *Bacchus* clearly sets forth the Court's best current understanding of federal law on the issue of the constitutionality of Georgia's pre-*Bacchus* statute. Under this understanding, the pre-*Bacchus* statute is clearly unconstitutional.

Indeed, the Georgia Supreme Court and the trial court so held in both their opinions. As the Georgia Supreme Court stated:

> In the proceedings below, the trial court determined that the pre-1985 statute was unconstitutional because it violated the Commerce Clause of the U.S. Constitution. The court further held that the ruling would only be applied prospectively so that Beam is not entitled to a refund. We affirm.

J.A. at pp. 100-01. Relying upon *Bacchus*, the Georgia Supreme Court affirmed the trial court's holding that the pre-*Bacchus* statute was unconstitutional. In accordance with the dissent in *ATA*, the Georgia Supreme Court applied its "best *current* understanding of federal law," *ATA, supra*, 58 U.S.L.W. at 4715, in ruling as a substantive matter that the pre-*Bacchus* statute was unconstitutional. The Georgia Supreme Court then correctly determined that the decision whether to accord Beam any retroactive relief was a remedial decision. The court erred, however, when it held as a matter of remedy, only, that it would not accord Beam any retroactive relief despite the tax statute's constitutional infirmity. J.A. at p. 105. Under the law of *McKesson, supra*, which is indisputably founded upon longstanding principles of federal due process law, *see* Pet. Brf. at 16-19, Beam is entitled to some form of retroactive remedy. The flexibility with which the State may accord such a remedy within the confines of federal due process is described in *McKesson*, 58 U.S.L.W. at 4671. Whatever remedy the State applies, it must be "clear and certain," requiring the State to "ensure that the tax as *actually imposed* on petitioner and its competitors during the contested tax period does not deprive petitioner of tax moneys in a manner that discriminates against interstate commerce." *McKesson*, 58 U.S.L.W. at 4671, 4672 (emphasis in original, footnote omitted).

The unanimous Court in *McKesson* declined to rule on the issue, whether the "State's reliance on a 'presumptively valid statute' was a relevant consideration of [the

State's] obligation to provide relief for its unconstitutional deprivation of property," 58 U.S.L.W. at 4672, finding instead that Florida had not relied upon a presumptively valid tax when it adopted its post-*Bacchus* liquor tax statute. As the discussion in section II.A. of Beam's original brief and the discussion above in section I.A.1. clearly demonstrate, the State of Georgia likewise had no reasoned basis for believing by 1982 that the pre-*Bacchus* statute was constitutional.[7] The State of Georgia cannot now argue that it relied on a presumptively valid statute in the two-and-one-half years prior to *Bacchus* and the half year after *Bacchus*.

II. THE STATE HAS FULLY FAILED TO ADDRESS THE TAXES PAID BY BEAM AFTER *BACCHUS* WAS DECIDED

Apparently conceding that the State has no basis for refusing to grant Beam a remedy for taxes paid by Beam after *Bacchus* was decided, the State has not responded to Argument III set forth in Beam's original brief at 42-43.

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[7] The State makes much of the fact that Beam "never paid its tax under protest or sought any protection from paying the tax." Brief of Respondents at 5. *See also id.*, at 21 and 28-29. The State completely ignores the lack of any procedure for paying the tax under protest in Georgia law. Moreover, payment of the tax was a precondition to doing business in the State of Georgia. *McKesson* leaves no doubt that under these circumstances, Beam paid the taxes under duress. The lack of pre-deprivation process entitles Beam to a post-deprivation remedy.

Unquestionably, Beam is entitled at the very least to relief for taxes paid after *Bacchus* was decided.

Respectfully submitted,

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